

I have brought two successful junk fax cases in Pennsylvania District Justice courts, and have been able to settle several other actions out of court.

Since the enforcement of much of this law is left to consumers, the private right of action and statutory damages are critically important to the effectiveness of the law. Any changes in regulations or interpretations that weaken or confuse these aspects of the law are likely to undermine the entire effectiveness of the law.

My experience and that of many others who have brought action in our local courts is that judges and magistrates are not familiar with either this law or its enforcement provisions. They are therefore at risk of misunderstanding the law and FCC's interpretations. So the rules must be written in a direct and unambiguous fashion, anticipating common misunderstandings. In particular, the following points should be made:

--The fax advertisement provisions of the TCPA apply equally to faxes sent to a computer fax modem or internet 'fax to e-mail' service (e.g. efax.com, ureach.com) as to a standalone fax machine.

--The harm done by unwanted fax communications amounts to much more than the loss of paper and ink or toner: there is the potential disruption to important business and personal communications, and the trespass the violation represents.

--While courts have discretion with respect to trebling damages, they have no discretion over the liquidated damages set by statute.

--States do not need to ratify the law or affirmatively enable their residents to exercise their right to bring court action under it.

--State law cannot override the TCPA, it can only add further restrictions or additional penalties.

--Courts may not reduce the statutory damages just because the defendant is a small or local business, or because the offender claims the penalty will force his business into bankruptcy. Such dire straits do not justify stealing money from a bank or from a customer--they do not justify advertising by theft.

--An established business relationship does not grant implicit permission for transmission of fax advertisements.

--Publication of a fax number on a business card, in an advertisement, or in a directory, even a business directory, is not an invitation to send unsolicited advertisements to that number.

--A consumer has the right to recover damages for the first unsolicited fax advertisement from a sender. The 'two calls in twelve months' clause applies only to nonautomated voice telemarketing calls.

--An advertiser cannot evade damages by offering an "opt-out" telephone number on the fax, even if the number is toll-free.

--Manufacturers of telephone or computer equipment capable of transmitting faxes should include in their instruction manuals a statement that unsolicited advertising by fax is illegal. This will help avoid confusion over the Commission's interpretation of "knowing or willful."

--Fax messages touting the stock of a company constitute advertisements for purposes of this law, even if they are labeled "news" and do not offer a stock touting service for sale.

Junk fax advertisers are now using computers to "war dial" entire telephone exchanges, number by number, to identify fax machines to transmit advertisements to. The definition of "transmission" should extend to calls initiated for purposes of transmitting an unsolicited advertisement, even if there is no fax machine at the number called or the transmission is interrupted.

Junk faxers also are transmitting their advertisements 24 hours a day. Since many telephone subscribers now have fax capabilities on their home telephones, as part of a home business, to facilitate communications with their employers, or for personal reasons, they find themselves being woken up late at night by junk fax calls. Time restrictions on telemarketing should be extended to unsolicited fax transmission as well, so consumers who are victimized during late-night hours may recover additional damages from the sender.

Finally, a substantial number of junk fax advertisements are being sent by hard-core violators such as "Market News Alert" and other stock tout services, American Blast Fax, Fax.com, and their various successors and associates. Some of these companies are set up to be 'judgement proof,' through hidden or defunct corporate identities, operation from anonymous "mail drops," and the use of shell corporations to shield assets from judgements. The individuals behind these companies know well of the law and the penalties for violation, yet they continue transmitting junk faxes with impunity. FCC must take concerted action against these violators, and seek criminal penalties against the worst of them, because they will ignore any civil judgements. Only the threat of jail time will stop them. Once a few offenders are sentenced to prison in well-publicized cases, the small-fry fly-by-nighters and the individuals who contract with the big offenders will get out of junk faxing.